IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

AMERICAN MORTGAGE CO. OF SCOTLAND,

Appellant.

vs.

ERVEN O'HARRA, *et al.*

Appellees.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON.

APPELLANT'S BRIEF.

ZERA SNOW,
For Appellant.

HENRY ACH,
For Appellees.

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STATEMENT OF THE CASE.

Complainant filed its bill originally against Erven O'Harra and all of the other defendants in the suit except Oliver Cheeley, Christina Cheeley and Thomas Thompson, the purpose of the bill being to rectify a mistake which had been made by Erven O'Harra and wife in a mortgage to the complainant, the mistake consisting of a mortgage for one piece of land when the mortgage should have been upon another, and for the purpose of foreclosing this mortgage as corrected, Erven O'Harra being the owner at the time the mortgage was executed, the defendant Rourke being charged as the owner of the property at

the time of the filing of the bill, and purchasing with notice of complainant's equity ; Smith being charged as one of the parties through whom the chain of title passed from O'Harra to Rourke. Thomas Rourke and wife only, answered the original bill. Pending final hearing Rourke and wife transferred the property to Cheeley and wife, who in turn mortgaged to Thomas Thompson. Thereupon the complainant filed a supplemental bill, making Cheeley and wife and Thomas Thompson parties ; J. C. Long being likewise made a party to the supplemental bill by reason of an alleged judgment alleged to have been recovered against Rourke; Long and Thompson being made parties as subsequent lien claimants. To this supplemental bill Rourke and wife, Cheeley and wife and Thompson filed a joint answer, and the cause having been brought to issue, the testimony was taken and on the trial in the Court below the Court found and decreed the mistake contended for and likewise found, and decreed that the Cheeleys were purchasers in good faith. Complainant's bill was, therefore, dismissed. The questions arising in the cause were principally questions of fact.

I.

It is not disputed but that the defendant O'Harra mortgaged a piece of land to the complainant to which O'Harra had no interest or title whatsoever, and that in fact he intended to mortgage the particular piece of land charged in the bill, and the facts concerning the execution of this mortgage and the amount due on it were in no way disputed below, nor is there dispute here.

II.

Were Cheeley and wife innocent purchasers, purchasing without notice of complainant's equity ? This is a disputed question, raising questions of law and fact.

If the disputed question be found for the defendants the decree below was correct and should be affirmed. If found for the complainant, then the appellant's contention is that the decree should be reversed and the cause proceed to a decree of foreclosure upon the property intended to be mortgaged.

The Evidence.

It appears that O'Harra, being the owner of a quarter section of land in Umatilla County, Oregon, undertook to mortgage the same to the complainant, but misdescribed the same. Subsequently, and a long time after the execution of the mortgage, this mistake was discovered by O'Harra, as also was it discovered by D. K. Smith, who at one time

had represented the complainant in effecting loans in Oregon, and who was so representing the complainant at the time of the discovery of the mistake. O'Harra had likewise given a second mortgage on the property, misdescribed as in the first, to J. C. Long. The mistake as to complainant's mortgage being discovered, Smith promised to rectify it, but failed to advise complainant, whose chief officers never knew of the mistake until after O'Harra had undertaken subsequently to transfer the property. O'Harra made an agreement with Thomas Thomp-on to sell the property to him, and whereby Thompson was to purchase the property, pay off the complainant's debt, and likewise pay off the second mortgage to Long, and in addition pay some other debts O'Harra owed, and pursuant to this, O'Harra deeded the property; but it seems D. K. Smith had intervened for the purpose of securing title to the property and the deed in fact was made to Smith, though O'Harra never knew that Smith was the grantee in the deed until after its execution and delivery, Smith having caused his own name to be inserted in the deed instead of Thompson, who became Smith's lessee of the property, Thompson subsequently sub-letting to Cheeley (Printed Record p. 21, 22, 23 and 24). Subsequently Smith transferred the property to O'Harra who, after suit brought by the complainant to rectify the mistake, transferred to the Cheeleys. This transfer *pendente lite* is admitted by the answer to the supplemental bill.

THE CHEELEYS AS BONA FIDE PURCHASERS WITHOUT NOTICE OF COMPLAINANT'S EQUITY.

The complainant submits two questions on this branch of the case:

1. The Cheeleys purchased *pendente lite* and are chargeable by law with notice of complainant's equity.

2. The fact is, they had actual notice of complainant's equity.

FIRST.

A purchaser pendente lite gets no right superior to that of his vendor.

There is no Oregon statute on the subject of *lis pendens* requiring any filing of any notice or pendency of suit as notice to purchasers *pendente lite*, and if there were one, inasmuch as provisions therefor relate to practice, it may be doubtful how far a failure to file *lis pendens* could operate to change the equity rule prevailing in the United States courts.

Tilton vs. *Cofield*, 93 U. S., 163.

Harrington vs. *Slade*, 22 Barb., 166.

Ferrier vs. *Buzick*, 6 Ia., 258.

McGregor vs. *McGregor*, 21 Ia., 441.

Jackson vs. *Warren*, 32 Ill., 340.

Gossom vs. *Donaldson*, 18 B. Mon., 237.

SECOND.

The Cheeleys had notice of complainant's equity, and the testimony on this point is so uncontradicted that complainant's counsel is at a loss to account for the decree in the cause except upon the theory that the Court below has mistaken the contention of the defendants in the suit.

The reported testimony supports complainant's contention in this respect. It is testified to by O'Harra. Printed Record p. 22. Answer to Q. 14. By Edmiston, printed Record p. 25, 26, 27. The testimony of these witnesses is to the effect that both before Cheeley purchased and after, they had conversations with him, Edmiston testifying to these conversations in the presence of Cheeley's wife, and that the admissions made of knowledge as to plaintiff's equity in the Cheeleys was talked of and admitted. Neither of the Cheeleys was sworn as witnesses The nature of their purchase, what they paid for the property when purchasing from Rourke, and the terms of the purchase were not disclosed. Under these circumstances there was clearly an obligation on the part of the defendants to explain the Cheeley purchase if it was intended to rely upon the proposition, that regardless of Rourke's knowledge as to complainant's equity the Cheeleys had none. Complainant's testimony on this point and the silence of the evidence on the part of the defendants is sufficient to effectually dispose of the contention that although Rourke may have had notice, the Cheeleys had not.

We understand the finding in the decree touching the purchase in good faith by the Cheeleys to have been based upon this contention of the defendants. As to whether or not the defendant Rourke had notice, and if not, whether Cheeley could become a purchaser in good faith with notice, are questions never passed upon by the Court below. Under the decree the Cheeleys were treated as though they were purchasers directly from Smith, the original grantee of O'Harra. If, however, on this appeal, this Court will determine from the whole record whether or not there is any other contention of fact or law upon

which the decree can be supported, then the complainant contends the only other questions arising in the cause are

1. Did the defendant Rourke have notice of complainant's equity?

2. Did his legal counsel who acted for him in the purchase have notice of this equity, and is he chargeable with this notice?

The Rourkes as Purchasers in Good Faith.

Complainant contends that the burden of proof to support a title resting upon the good faith of the purchaser is upon him who claims to be a purchaser in good faith, and that the evidence in this case is such as does not answer this burden in so far as Rourke's purchase is concerned.

Complainant's equity arising from the mistake was clearly established, and the Court finds this in its decree, and except for some intervening cause complainant would be entitled to the decree prayed for. This intervening cause consists of the claim by defendants that Rourke was a purchaser in good faith, and being so, could hold and pass title to Cheeley, who had notice of complainant's equity. The burden of proof was with the defendants to establish the fact of Rourke's good faith in the purchase.

Weber vs. *Rothchild*, 15 Or. 389.

Cansler vs. *Cobb*, 77 N. C. 30.

Callan vs. *Statham*, 23 How. 477.

Mosier vs. *Knox College*, 32 Ill. 155.

Zimmer vs. *Miller*, 64 Md. 296.

Zilnicker vs. *Brigham*, 74 Ala. 598.

Gallatin vs. *Erwin*, Hopk. Ch. 63.

The evidence on this point should be examined. Rourke purchased through D. K. Smith. Smith represented the complainant at the time he purchased from O'Harra. He practiced an indirect fraud on O'Harra by intervening in the negotiations between O'Harra and Thompson, and causing the deed to the property to be executed in his (Smith's) name. He intervened through the medium of Thompson, who was negotiating with O'Harra for an exchange of properties and between Smith and Thompson there was an understanding that Smith

In answer to the question, on cross examination, "Did he say anything to you at that time about any mortgage on O'Harra's land?" (referring to the counsel who examined the title for him, Mr. Balleray.) he testifies: "I do not recollect."

Printed Record, p. 46, q. 33.

He says he got his first information of the mistake in the complainant's mortgage several months after his purchase, and that he got the information from the attorney who examined his title, Mr. Balleray. That he got this information before the first note which he had executed to Smith became due, but he does not recollect to have made any objection at the time of the payment of this first note arising from the fact of the complainant's mortgage. He says: "I don't know that I made any objection at the time, but Smith and I had discussed the matter before the note came due, and I think he told me he had transferred the note—sold it."

Q. Who did he say he had sold it to?
A. He didn't say.
Q. Did you ask him?
A. I don't remember that I did.
Q. When you paid Mr. Bailey did you inquire who owned the note?
A. I don't remember of doing so.
Q. Did you learn who owned the note?
A. I did not.
Q. How long was the note overdue when you paid it?
A. I don't remember that it was overdue at all; I think I paid it when it was due.
Q. Did you ask for any indemnity against this mortgage to the Scotch company at or before the time you paid the note?
A. I don't think I did.

From the testimony given by Rourke it appears that he has testified in his sworn answer to the original and supplemental bill that the purchase price of the property in question agreed to be paid by him to Smith was $3,000, one thousand dollars of which was paid in cash at the time of the purchase, and a single note for $2,000 given for the deferred payment.

In his answer likewise he says that he had paid this note of $2,000 before he learned of the complainant's equity. In his testimony given on the trial he testified that the consideration for the land in question and one other piece of land was $3,500, one thousand of which was paid down and *two* notes executed for the remainder of the purchase price of $1,250 each, and that he learned a few months after the transaction, and before either of the notes became due, of plaintiff's equity,

and learned it from the counsel who had examined his title. Testified in one examination for the complainant that he had never seen the land before purchase, subsequently in his examination in his own behalf testified that he had. Testified that one of the $1,250 notes was paid by Mr. Bailey, and that it was held by him for collection. Again, subsequently testified that he thinks the note had been transferred and was not so held for collection. Testifies, with reference to the subject of the examination for title made for him by counsel, that he does not recollect whether anything was said to him by that counsel as to the mistake in the complainant's mortgage, or about the fact of there being any mortgage on the O'Harra land. In fact, examination of the defendant Rourke is so unsatisfactory, counsel requests the Court to read this defendant's testimony in the light of his sworn answer, since without reproduction of the testimony as given by him the various conflicting statements of Rourke cannot be printed, and to reproduce it in the brief is unnecessary since it is printed in the Record.

The Knowledge on the Part of Rourke's Attorneys Before the Purchase Made by Him.

The defendant, J. C. Long, who in fact was a second mortgagee on the O'Harra land under a mortgage executed by O'Harra, and as to whose mortgage there was the same mistake in description as had occurred in the complainant's mortgage, was called in behalf of the complainant, and he testified that he had a mortgage made subsequent to the mortgage to the complainant, and that it was drawn from the description of the property furnished by the record of the complainant's mortgage. That he heard of a sale of the property between O'Harra and Thompson and then for the first time learned the Scotch Company's mortgage was wrong, on the wrong piece of land. Knowing that the description in his own was taken from the description of the complainant's mortgage as disclosed by the record, he knew that his own would be wrong too. He went immediately to see O'Harra, who said that Thompson would pay him his money. That that was the contract, and thereupon the witness, Thompson and O'Harra came to Pendleton. Thompson then refused to pay, saying that Smith was to do the paying. That he, the witness, took steps to bring suit for the land about the time that the land was transferred from Smith to Rourke. He called to see Mr. Bailey and Mr. Turner (of the firm of Bailey, Turner & Balleray) with reference to his suit for the land, and found that they were retained by Smith and Thompson. He testifies:

Q. Did you explain to them what you wanted?

A. Yes, sir; they had been my attorneys in other cases before that.

Q. Did they tell you they had been retained by Smith and Thompson?

A. Yes, sir.

Q. How long was that before the transfer to Rourke?

A. Well, it was within twenty-four hours; I found out within a few hours after I spoke to them that it was transferred to Rourke. I really don't know whether it was transferred when I talked with Bailey & Turner or after that, but I found out that it was transferred in a few hours (that or the next day) after the conversation.

Q. In that conversation with the attorneys did they say anything about Rourke?

A. No, sir.

Q. Did they give you any other reasons for not taking your case than that they had been retained by Thompson and Smith?

A. No, sir.

The witness then testified that he called to see another attorney about commencing suit for the land, but not having confidence in him he finally spoke to a third and ended with taking a judgment against O'Harra for the amount of money embraced in his mortgage from O'Harra to him. He says that it was in the course of these proceedings that he learned that Smith had deeded to Rourke and that he took these proceedings with reference to his own judgment against O'Harra within twenty-four hours after he came to Pendleton, and that it was after he had talked with Bailey and Turner that the deed was executed and placed on record from Smith to Rourke. That he first talked with Turner and Bailey in the evening of the day he came to Pendleton and it was some time during the next day that he learned the deed had been made and put of record. On cross examination this witness stated that both Mr. Turner and Mr. Bailey were in the office when he consulted them on the evening of his arrival there with reference to commencing a suit for the land arising out of the mis-description in his mortgage, and that the conversation was had with one of them, he thinks with Mr. Turner, but they were both in the office. He was at the office twice. He admits he did not make any detailed statement of his trouble, but he says:

"I can make this statement that you (referring to the cross examiner, Mr. Bailey) or Mr. Turner, one, told me that you could not take the case. That you were employed or retained or something to that effect, by the other party."

In the light of this testimony of Rourke himself and of Long, it is submitted by complainant that the silence of the defendant's testimony as to what took place between Turner and Bailey and the witness, is ominous. Mr. Balleray is sworn and testifies to an examination of the title made by him, but Mr. Bailey and Mr. Turner are silent as to what took place between the witness, Long and them, and

the witness's testimony is uncontradicted. There is a strong evidence that two of the firm of Turner, Bailey & Balleray, before the pretended purchase by Rourke from Smith, had knowledge of the misdescription in the mortgages, and although Rourke has twice sworn in his answers that the purchase price of the property was $3,000.00, one thousand of which was paid down and a note for $2,000.00 executed, he has sworn in his testimony that the purchase price of the property and other property was $3,500.00, of which sum $1,000.00 was paid down and two notes executed for $1,250.00 each, one of which he paid and the other was surrendered in a settlement taking place in 1886 or 1887. It will be difficult for this Court, as it was difficult for the Court below, to determine what it was that Rourke paid for the property in question, and upon that would hinge one of the elements of a bona fide purchaser.

It seems, also, Mr. Balleray, who examined title for Rourke, drew the deed from O'Harra to Rourke; he is one of the firm of Bailey, Turner and Balleray whom Long consulted; in the deed drawn by Mr. Balleray is the appearance of the same mistake as occurred in complainant's mortgage, indicating knowledge on the part of Mr. Balleray.

See the original deed certified to this Court.

Respectfully submitted,

ZERA SNOW.
For Appellant.